IN THE

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1958.

No. 67.

NANCY CORINNE DYER and J. RAYMOND DYER,
Petitioners,

v.

SECURITIES AND EXCHANGE COMMISSION and
UNION ELECTRIC COMPANY,

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

## PETITIONERS' SUPPLEMENTARY REPLY TO BRIEF OF SECURITIES AND EXCHANGE COMMISSION.

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

## PETITIONERS' SUPPLEMENTARY REPLY TO BRIEF OF SECURITIES AND EXCHANGE COMMISSION.

### STATEMENT.

This brief is filed by leave under Rule 24 (4) of this court. The SEC, in its brief herein, suggested that this court defer its decision until the court below had decided

*Dyer v. SEC*, Case No. 15,989. That case was heard November 17, 1958, at which time the SEC and petitioners both filed supplementary briefs. Union objected to the filing of petitioners' supplementary brief on the ground that it was "factually unfounded and scandalous". Though afforded opportunity, neither it nor the SEC filed any response.

In their said supplementary brief petitioners called the attention of the court below to *WKAT, Inc. v. FCC* (CA DC), 258 F. 2d 418, published October 20, 1958. In line with that decision the U. S. Attorney General, on November 8, filed an amicus curiae brief with Judge Horace Stern, the special FCC hearing officer in the remanded *WKAT* case, and on November 10 counsel for the FCC filed his brief. Petitioners' November 17 supplementary brief in Case No. 15,989 was based on that decision and those briefs.

On December 1 Judge Stern issued his decision in the remanded *WKAT* case, which had been consolidated before the FCC with the cases of three other Channel 10 Miami television applicants. Judge Stern held that FCC Commissioner Richard A. Mack should have disqualified himself in the initial FCC proceedings, and that two of the applicants, WKAT, Inc. and Public Service Television, Inc., who in the initial proceedings had made improper ex parte contacts with Mack, were thereby disqualified. Though Public Service had been awarded Channel 10 initially, and had been operating on it over its station WPST since August 2, 1957, Judge Stern did not hold the remanded case moot. He recommended that the award be revoked.

## SUMMARY OF ARGUMENT.

In the light of the court decision in *WKAT*, and the law as set forth in the aforesaid brief of the FCC, in the amicus brief of the U. S. Attorney General and in Judge Stern's decision, the mootness ruling of the court below was error and should be reversed regardless of whatever action in Case No. 15,989 it may take. Bias and prejudice were charged in the petition below (Item 1, para. 6), and in the light of the subsequent May 24, 1957 report of the Department of Justice (Item 37; Pr. Rec. 106) that bias and prejudice were shown. The shielding of perjury on the part of Union's president by the SEC was likewise charged (Item 34, para. 20) and likewise shown (Items 16 and 27, Ex. B).

There were also ex parte contacts made by Union with the SEC, which rendered the order under review void. The court below should have remanded the case, as in *WKAT*, regardless of the fact that the stockholders' meeting had been held and the proxies voted. Improprieties of procedure violating due process preclude dismissal for mootness.

As the record in the instant case conclusively shows (the matter stands admitted), though Union was at all times a registered public utility holding company the SEC, initially, considered its proposed proxy material under the Securities Exchange Act of 1934, and not under the Public Utility Holding Company Act of 1935, as it should. Different standards apply. See *Halsted v. SEC* (CA DC 1950), 182 F. 2d 660, 662. Before the March 13-15, 1957 hearing was held, or even scheduled, the SEC approved Union's proxy material, approved the exclusion therefrom of petitioners' By-Law and Resolution proposals, and their other proposed recitals, and found Union's November 18, 1956 ads, and its November 19, 1956 stockholder communica-

tions, not to constitute solicitations under Rule X-14A-1. Thus the case had already been decided before the hearing was held. The SEC entered the order under review with bias and prejudice as those terms are defined in *Black*. Cases that are pre-decided, and hence determined with bias and prejudice, are not moot.

To find this case moot the lower court had to find, as it did, that the stockholders' meeting had been held. But if there was material perjury, and improper ex parte contacts, and a predetermination, the case was not moot. Instead, the order under review was void and the meeting was invalid.

Furthermore, if any of the SEC Commissioners should have disqualified himself the order was void and the meeting was invalid. An invalid sanction of a meeting, no more than the invalid bestowal of a television channel or a patent, cannot support a mootness holding.

Finally, at the time the mootness decision below was handed down on March 14, 1958 (Item 26) the controversy here had already become a continuing controversy, as the court below had been made aware (Item 24). The March 6-7, 1958, SEC hearing on Union's 1958 proxy material had already been held. Case No. 15,989 was filed April 4, 1958 (Item 27). After the November 17, 1958, hearing in that case petitioners notified the SEC that they would controvert Union's 1959 proxy material if it named any of Union's present directors as proxy agents or sought their re-election to Union's board. See Appendix A hereof. Continuing controversies are not moot, but continuation can only be shown supplementally.

## ARGUMENT.

### 1. Disqualifications.

In *Precision Instrument Mfg. Co. v. Automotive M. M. Co.* (1945), 324 U. S. 806, this court stated, l. c. 819, that "Those who have applications pending with the Patent Office or who are parties to Patent Office proceedings have an uncompromising duty to report to it all the facts concerning possible fraud or inequitableness underlying the applications in issue." In his amicus brief to Judge Stern, p. 27, the U. S. Attorney General cited that case in support of his contention that it was the "duty" of all the Channel 10 applicants, if they believed improper activities were taking place, "to inform the Commission and other interested law-enforcement agencies", even though they had "reasonable doubts as to the sufficiency of the proof of the inequitable conduct".

In the instant case petitioners reported to the court below the alleged March 13, 1957, perjury of Mr. McAfee in their brief of October 10, 1957, on the admissibility of their Exhibits 11, 12, 14, 18, 19 and 21, which Exhibits were not filed by the SEC until September 25, 1957 (Item 7, Vol. III, Docs. 41-46). They likewise pointed it out in their November 19, 1957, motion to adduce additional evidence (Item 16). Copies of that brief and that motion were duly served on the SEC. Petitioners also reported the alleged perjury to the U. S. Department of Justice (Item 34, para. 19), before the decision below was rendered.

However, the U. S. Attorney General did not come into this case or Case No. 15,989, as amicus curiae. Neither the SEC nor the Department of Justice did anything. In the *Precision Instrument* case, where the history of the patent was "steeped in perjury" (l. c. 816), it was not reported to the Patent Office or the Department of Justice.

*Mas v. Coca-Cola Co.* (C.A. 4, 1947), 163 F. 2d 505, likewise cited by the U. S. Attorney General in his brief to

Judge Stern, and by Judge Stern in his said decision, also dealt with perjury before the Patent Office. The court held, l. c. 510, that patents are "affected with a public interest". No one can be given one if his conduct in securing it is "clouded with forgery, and perjury or fraud". The operation of a public utility is affected with a public interest, too.

In the instant case the petition for review (Item 1, para. 6) alleges bias and prejudice and favoritism on the part of the SEC. When Union's 1958 proxy material was before the SEC, petitioners sought the disqualification of Commissioners Orrick, Patterson, Hastings and Sargent on the grounds of bias and prejudice and favoritism, alleging the March 13, 1957, perjury of Mr. McAfee and the belief (Item 34, para. 20) that said Commissioners "have shielded said material perjury of Union president J. Wesley McAfee, and will continue to shield it insofar as they are able". The petition for review in Case No. 15,989 alleges the bias and prejudice and favoritism of said Commissioners, the "commitment" of the first named three, and the refusal of all four to disqualify themselves (Item 27, para. 5 and para. 7).

In its March 21, 1958, Findings and Opinion in Case No. 15,989 the SEC (Commissioner Sargent not participating) found (Item 27, Ex. B) that the question of the truth of Mr. McAfee's "report" on Union's 1955 Illinois lobbying venture was "not an issue in these proceedings," and that, as regards his testimony respecting the truth of that report, "the present proceedings are not a proper forum for the raising of this matter since the accuracy of such testimony is not an issue herein." The SEC also found that "the hearing examiner properly denied Dyer's offer of proof concerning the accuracy of certain testimony of Union's president in the hearings with respect to management's proxy material for the 1957 meeting of stockholders."

If a deliberate misrepresentation of material facts by an applicant for a patent or for a television channel (*FCC v. WOKO, Inc.* [1946], 329 U. S. 223) is ground for that applicant's disqualification, we submit that the question of whether there has been deliberate misrepresentation of material facts by a public utility president seeking SEC approval of proxy material naming him as a proxy agent and director is pertinent to the qualification of that individual to receive SEC approval of that proxy material. That question of qualification is not moot while that individual is still a member of declarant's board, as Mr. McAfee is. See *Root Refining Co. v. Universal Oil Products Co.* (CA 3, 1948), 169 F. 2d 514, 541, and *Keystone Driller Co. v. General Excavator Co.* (1933), 290 U. S. 240, 244-5, both cited by Judge Stern.

We further submit that by their approval (Item 7, Doc. 39) of his "report" (if it ultimately be found false in the light of Petitioners' Exhibits 11 and 21 [Item 7, Docs. 41 and 46] and the Department of Justice report, Item 37), and by ordering it released to the press, inserted in the press as a paid advertisement and sent to the stockholders, without first making at least some inquiry as to its truth (Item 7, pp. 282, 284), and by their sponsoring of Union's actions herein, Mr. McAfee's co-directors failed to meet the standards of the Public Utility Holding Company Act as set forth in *Halsted v. SEC* (C. A. D. C. 1950), 182 F. 2d 660, 662, and thereby disqualified themselves for service as proxy agents or directors elected through the use of proxy material subject to SEC approval. That question of their qualification, so long as they are still serving as directors, as they are, is not moot. *Mester v. U. S.* (E. D. N. Y. 1947), 70 F. Supp. 118, aff'd 332 U. S. 749.

2. **Continuing Controversy.**

Controversies that are continuing are not moot. See Petition for Rehearing herein, pp. 21-24 (Item 20). The controversy here, which started in 1957, was continued in

1958 and will be continued in 1959. See Appendix A. The controversy between petitioners and Union was renewed at the December 8-9, 1958, hearing before the Missouri Public Service Commission, on Union's application for a $7,893,000 per annum rate increase. Petitioners sought intervention as stockholders and consumers and Union opposed their intervention. Intervention was allowed.

### 3. **Ex Parte Contacts.**

There were ex parte contacts made by Union with the SEC, as shown by the record. Mr. McAfee, Union's president, testified to one (Item 7, p. 80). When asked if Miss Dyer's By-Law banning false advertising, proposed under Missouri law, was submitted for inclusion in management's proxy material Mr. McAfee said he had grave doubt, and that, in fact, "I came here to attempt to ascertain whether it complied with the rules . . . We came to the SEC." The SEC excluded it, without assignment of reason.

Another ex parte contact may be inferred from the statement of Mr. Woodbridge, Union's vice-president. Mr. Shapiro, Union's secretary, had testified (Item 7, p. 242) that on March 6, 1957, letters in connection with Union's proxy solicitation had been sent to bankers and brokers holding Union stock as fiduciaries—"750 or 800 copies" of each letter (Id., p. 243). That was after the order of February 27, 1957 had been entered, prohibiting all solicitation except pursuant to Rule U-62 and a declaration permitted to become effective (Pr. Rec. 42). Rule U-62 (c) requires the declaration to contain "copies of any letters of solicitation proposed to be used". Union's declaration did not contain copies of those March 6, 1957 letters, though it was filed March 4, 1957 (Item 7, p. 271). They were not introduced into evidence at all.

Mr. Woodbridge stated (Item 7, p. 271) that he sent Mr. Dyer a copy of Union's declaration on March 8, 1957, "the first day I got back to the office after I was here in Wash-

ington", and that he did not receive Mr. Dyer's letter of March 2, 1957 until then. During the interval he was in Washington, presumably in connection with the filing of Union's declaration. The implication is that either Union sent out its "750 or 800" letters to bankers and brokers without SEC sanction, or that such sanction was accorded Mr. Woodbridge at some ex parte meeting in Washington during his presence there on or before March 6, 1957, when the letters were sent out.

Another ex parte contact was had over the telephone, between Mr. Woodbridge and Joseph S. Mitchell, Jr., of the SEC's Division of Corporate Regulation. On March 21, 1957 Union had submitted its Amendment No. 4, and on March 22 its Post-Effective Amendment No. 1 (Item 34, Ex. A). Petitioners had immediately objected to both (Pr. Rec. 105). Union then filed its Post-Effective Amendment No. 2, slightly modifying No. 1, and Mr. Woodbridge telephoned the SEC asking for clearance. He did not notify petitioners as he had stipulated he would (Item 7, pp. 9, 13).

Mr. Mitchell had also stipulated that he would give petitioners notice of "every step" taken (Item 7, pp. 13, 273), and the SEC had embodied both stipulations in its formal order of March 15, 1957 (Pr. Rec. 101). Nonetheless, without notice to petitioners and in violation of his stipulation and that formal SEC order, Mr. Mitchell approved Union's Amendment No. 4 and Post-Effective Amendment No. 1 as amended by No. 2, in that ex parte telephone conversation with Mr. Woodbridge. Mr. Mitchell admitted that ex parte approval to Hon. George H. Moore, in chambers on April 9, 1957, in proceedings in *SEC v. Dyer* (E. D. Mo. 1958), 22 F. R. D. 229. See Item 34, para. 8; Pr. Rec. 105.

Ex parte contacts formed the basis of Judge Stern's decision in the remanded *WKAT* case. Applicable cases are *Berkshire Employees Ass'n v. NLRB* (C. A. 3, 1941), 121 F. 2d 235; *Inland Steel Co. v. NLRB* (C. A. 7, 1940), 109

F. 2d 9; *Montgomery Ward & Co. v. NLRB* (C. A. 8, 1939), 103 F. 2d 147; *NLRB v. Phelps* (C. A. 5, 1943), 136 F. 2d 562; *Ohio Bell Tel. Co. v. Pub. Util. Com.* (1937), 301 U. S. 292; *Trans World Airlines, Inc., v. CAB* (C. A., D. C. 1957), 254 F. 2d 90; *In re Murchison* (1955), 349 U. S. 133; *Tumey v. State of Ohio* (1927), 273 U. S. 510; *FCC v. Broadcasting Co.* (1940), 309 U. S. 134.

Judge Stern also cited and quoted *Deuteronomy 16:19* and Sir Edward Coke's statement at the Assizes in Norwich, August 4, 1606 (*Am. Bar Asso. Jour.*, Vol. 44, No. 9, pp. 862, 864) and several other classical authorities, all to the effect that a judgment "tainted by partiality" cannot stand. See *Chafee: Clean Hands Doctrine*, 47 Mich. L. R., 877-906, 1065-1096.

**4. Predetermination.**

That the SEC conducted an ex parte "trial run" of this case under the inapplicable Securities Exchange Act of 1934, i. e., conducted a sort of private "dress rehearsal" before it set the stage for the March 13-15, 1957 public hearing under the Public Utility Holding Company Act of 1935, is amply shown by the record. Union's declaration was filed March 4 (Item 7, p. 16). But Union filed its proxy material "in preliminary form" on February 18 (Id., pp. 18, 270), without notice to petitioners. Petitioners were sent a copy of Union's proxy material on March 8 (Id., p. 271). During the interval the ex parte "dress rehearsal" was held.

On that ex parte "trial run" Union objected to the inclusion of petitioners' proposed Resolution banning false advertising. Miss Dyer's proposed By-Law banning false ads had already been taken care of by Mr. McAfee (Item 7, p. 80). Mr. McAfee testified to Union's "trial run" objection to the Resolution, too (Item 7, p. 91). It was excluded, along with the By-Law. As Mr. Dyer stated at the hearing, the SEC, before the hearing, had already ruled

against the inclusion of those two false ad prohibitions (Id., pp. 95, 141, 311 and 325).

Indeed, all five of petitioners' rejected proposals were excluded in the ex parte "trial run," without affording petitioners opportunity to be heard (Item 7, p. 233). Mr. Mitchell stated that Union's material was "confidential," and that petitioners were "not entitled" to copies (Id., p. 272). Mr. Hennegan, of the SEC's Division of Corporation Finance, admitted that his Division's pre-trial ruling was that petitioners' mine stockholder By-Law was "legal under the laws of Missouri" (Id., p. 345). Petitioners' father-mother-guardian By-Law was similarly ruled off before the hearing (Id., p. 413).

The same was true as regards the ruling that Union's ads of November 18, 1956 (Item 7, Docs. 24, 25) and its November 19, 1956 communication to the stockholders (Id., Doc. 2) were not solicitations under Rule X-14A-1. Mr. Hennegan admitted that pre-trial ruling (Item 7, p. 211). Commissioner Orrick confirmed that "dress rehearsal" evaluation, in a letter to Mr. Dyer. That letter is in petitioners' supplementary record, the filing of which was authorized by the court below (Items 10 and 13).

Union's deletion of two sentences from petitioners' Statements in Support of two of their included proposals, one sentence charging Union's management with immoral lobbying and the other with malfeasance in office, was likewise prejudged and sanctioned (Item 7, pp. 293, 295). The February 21, 1957 letter of Mr. Hennegan's Division so stating is in petitioners' supplementary record. Commissioner Orrick sanctioned that pre-trial deletion (Item 7, p. 293). And then adhered to it, despite Petitioners' Exhibits 11 and 21 (Item 7, Docs. 41 and 46), which clearly refuted the pre-trial ruling. Commissioner Orrick and his fellow Commissioners held the deleted sentences to be "without factual foundation" (Item 34, para. 21; Item 15,

being petitioners' brief below, pp. 54-57), though they refused to pass on the "foundation" (Pr. Rec. 33, fn. 5).

In justification of these predeterminations Mr. Mitchell stated (Item 7, p. 96) that "what the Commission ruled under Regulation X-14 of the Securities Exchange Act is not completely applicable here. We are under a new set of rules under the Public Utility Holding Company Act of 1935, and the Commission has not ruled on what will be admitted or what will not be admitted under the 1935 Act. Now, what it ruled under the '34 Act is not particularly pertinent to what it might rule under the '35 Act."

We submit that what the SEC did was rule under the inapplicable '34 Act and then apply those rulings under the Act of '35. That is like prejudging grand larceny under the law of petit larceny and then carrying the ruling over. The SEC not only ignored *Halsted v. SEC*, supra; it prejudged the case. Sections 7 and 8 of the Administrative Procedure Act *(5 USCA 1006-7)* clearly provide for judicial-like proceedings. What the SEC did was what the court in *Berkshire Employees Ass'n v. NLRB*, supra, called "too violent a departure from what many generations of English speaking people have come to regard as essential to fair play."

Mr. Mitchell contended (Item 7, p. 415): "The Commission hasn't decided anything, Mr. Dyer. The Commission just gave comments to Union Electric Co. on material that was submitted to it." If a "comment" is not a decision, albeit an informal one, we do not know what is. See *Peck v. Greyhound Corp.* (S. D. N. Y. 1951), 97 F. Supp. 679, and *Aranow & Einhorn; Proxy Contests for Corporate Control* (1957), p. 417.

We submit that the SEC based its Findings and Conclusions on those "comments to Union Electric Co." The language is the same. It then refused to certify those "comments" to the court below, forcing petitioners to include them in its supplementary record.

*Black* defines bias as "inclination; bent . . . a preconceived opinion; a predisposition to decide a cause or an issue in a certain way." To prejudge is to predispose. Prejudice, according to *Black*, is "a leaning toward one side of a cause for some reason other than a conviction of its justice." The desire of the SEC to be consistent, to have its Findings and Opinion support its "comments" regardless of the evidence, is just such a reason.

Predetermination goes to due process. *Morgan v. U. S.* (1936), 298 U. S. 468; Id. (1938), 304 U. S. 1. It renders the subsequent hearing a farce. "Justice must satisfy the appearance of justice," as this court said in *In re Murchison*, supra, l. c. 136. See also *Connelly v. U. S. Dist. Court* (C. A. 9, 1951), 191 F. 2d 692, 697.

Though Mr. McAfee stated (Item 7, p. 163) that he was "sure" his fellow directors would be "perfectly willing to testify," and though petitioners asked that they be called (Item 7, Doc. 15, pp. 21-22) to fill in the gap of Mr. McAfee's hearsay testimony (Item 7, p. 153) respecting their intentions when they ordered his "report" released to the press, inserted therein as paid ads and sent to the stockholders, the SEC did not call them or permit petitioners to call them. It had predetermined the case. In the 1958 proceedings, when petitioners asked that they be subpoenaed, that "request for the issuance of subpoenaes" was denied (Item 27, Ex. B). In that way the SEC shielded the 1957 perjury of Mr. McAfee (Item 34, para. 20).

The denial of subpoena privilege is not something that can be rendered moot. *Inland Steel Co. v. NLRB*, supra, l. c. 18. Where there is a "distinct hampering of inquiry" the case is not moot. *Montgomery Ward & Co. v. NLRB*, supra, l. c. 156. As this court said in *FCC v. Broadcasting Co.*, supra, l. c. 143:

> "The laws under which these agencies operate prescribe the fundamentals of fair play. They require

that interested parties may be afforded an opportunity for hearing . . . "

To paraphrase Judge Stern in his *WKAT* Findings and Conclusions, the SEC, because of its predetermination of this case, "was rendered wholly unable to participate and vote with freedom and impartiality." That predetermination struck "at the very heart of the integrity of the judicial process." Petitioners "did not have a hearing before an impartial tribunal." Due process was denied, and the denial of due process is never moot.

## CONCLUSION.

The court below, without dissent, held these questions of perjury, ex parte contacts and predetermination moot. Judge Stern held that the improprieties in the *WKAT* case "cannot be tolerated", and that "all must be made to realize that they cannot permanently win by such tactics." A cynic would say that the distinction between the two cases lay in the difference in the amounts of newspaper publicity given each. Apart from that we submit there is no distinction. The petition for writ of certiorari herein should be granted forthwith and the decision below should be reversed and remanded without briefs or argument, with the direction that *WKAT, Inc. v. FCC, supra*, be followed.

The suggestion that it follow that case was made to the court below in Case No. 15,989. Both cases should be so dealt with. Not to grant certiorari in this case, even though the court below remands Case No. 15,989, would not only deprive petitioners and their fellow stockholders of the justice that is their due but would set a pernicious rule of administration of justice by the press.

Respectfully submitted,

J. RAYMOND DYER,
Attorney for Petitioners.

## APPENDIX A.

CHestnut 1-7028
J. Raymond Dyer
Attorney at Law
418 Olive Street
Saint Louis 2, Mo.

November 17, 1958.

Securities and Exchange Commission,
Washington 25, D. C.

Re: Union Electric Co., 315 N. 12th St.,
St. Louis 1, Mo.

Gentlemen,

This is to advise that I own 250 shares of the common stock of the above company and that my daughter Nancy Corinne Dyer, who is now 22 years old, owns 100 shares of the same.

I intend, as does Miss Dyer, whom I represent, to contest any proxy material or declaration of proxy material proposed by Union's management for use at the next annual meeting of its stockholders, scheduled for April 20, 1959, which names any of Union's present directors as management's proxy agents, or which looks to the re-election of any of those directors to Union's board.

Whether we shall solicit proxies ourselves remains to be seen, but our position as above recited has been definitely decided, in view of the position taken by Union's counsel at the hearing this morning in Dyer, Dyer & Day v. SEC and Union, Case No. 15,989, held before the U. S. Court of Appeals for the Eighth Circuit.

Very truly yours,

J. Raymond Dyer.